Supreme Court, U.S.
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No. _____

In The
Supreme Court of The United States
October Term 1996

CHARLES RAY LEWIS,
A.K.A. DON REYNOLDS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

*JOHN MARK MCDANIEL
ROBERT B. TUTEN
Counsellors at Law
223 East Side Square
Huntsville, Alabama 35801

(205) 534-3018
Attorneys for Petitioner
**Counsel of Record*

LEGAL ADVANTAGE * 432 Walnut Street * Cincinnati, OH 45202
(800) 581-2252

96 PP

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT APPLIED THE PROPER SENTENCING GUIDELINES BASED ON THE OFFENSE LEVEL?

II. WHETHER THE TRIAL COURT ERRED IN APPLYING AN UPWARD ADJUSTMENT FOR OBSTRUCTION OF JUSTICE?

III. WHETHER THE TRIAL COURT ERRED IN CONSIDERING CERTAIN TESTIMONY AS RELEVANT CONDUCT?

IV. WHETHER THE TRIAL COURT ERRED IN DENYING LEWIS A DOWNWARD ADJUSTMENT FOR ACCEPTANCE OF RESPONSIBILITY?

V. WHETHER THE TRIAL COURT ERRED IN GRANTING THE GOVERNMENT'S MOTION FOR AN UPWARD DEPARTURE?

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STATEMENT OF JURISDICTION

This is a criminal case. The United States District Court for the Northern District of Alabama entered judgment against Charles Ray Lewis on March 11, 1996. (Apdx. C.) A timely notice of appeal was given to the trial court.

The United States Court of Appeals for the Eleventh Circuit affirmed the sentence given to Lewis on March 27, 1997. Following a petition for rehearing and suggestion of rehearing en banc, the Court of Appeals denied such petition and issued that judgment as Mandate on May 20, 1997. (Apdx. A).

This Writ follows as an appeal from a judgment of the Eleventh Circuit Court of Appeals. (Apdx. B)

STATEMENT OF FACTS

As part of an undercover investigation, postal inspectors placed an ad in the Memphis Flyer newspaper in which they offered to buy or trade "unusual, hard to get, bizarre videos." (Apdx. D, pp.12-14).

Lewis responded to the ad using a fictitious name and mailed a list of gay, straight and bisexual videos he was willing to trade. (Apdx. D). Lewis and postal inspectors began corresponding and swapping videos.

Postal inspectors offered child pornography and Lewis allegedly accepted the offer. (Apdx. D, pp. 15-22). Lewis testified that he subsequently mailed a letter dated July 11, 1994 ending the video swapping relationship and declining child pornography. (Apdx. D, pp 30-31; pp 32-33). Postal inspectors testified that they never received the July 11 letter but received a letter dated August 11, 1994 in which Lewis allegedly wrote "I cannot wait to get the video. I go to the mailbox everyday hoping it's in the mail. I am really looking forward to trading some more videos. (Apdx. D, pp 23-24).

On August 26, 1994 Lewis allegedly accepted a controlled delivery of child pornography. (Apdx. D., pp 1-3; pp 4-11). A search warrant was executed at Lewis'

apartment in which a computer, numerous letters and numerous video tapes were seized. (Apdx. D, p. 28).

Lewis was indicted on November 30, 1995 in a seven count indictment charging him with the receipt or distribution through the mail of obscene material in violation of 18 U.S.C. §2252(a)(2) and 18 U.S.C. §1461.

On the day of trial and in the midst of a hearing on various motions to suppress evidence Lewis decided to plead guilty to counts three through seven of the indictment. Counts one and two were dismissed pursuant to the plea bargain agreement.

Subsequent to Lewis' plea of guilty, a lengthy sentencing hearing was held in which the Government requested an upward departure. (Apdx. D, pp. 36-43). Lewis testified on his own behalf. The trial court ruled that Lewis was not entitled to a reduction for acceptance of responsibility and imposed an upward departure for obstruction of justice. (Apdx. D, pp 36-44). Lewis was then sentenced to serve seventy one (71) months in federal custody. (Apdx. B).

ARGUMENT

I. THE TRIAL COURT ERRED BY APPLYING THE INCORRECT SENTENCING GUIDELINE BASE OFFENSE LEVEL.

Lewis plead guilty to counts 3, 4, 5 and 6 of the indictment charging him with mailing prohibited matter. The Court began its sentencing guideline calculation at guideline 2G3.1. USSG §2G3.1. Guideline 2G3.1 provides for a base offense level of ten. (Apdx. D, pp 34-36).

The Court then noted guideline section 2G3.1(c)(1), the cross reference section. (Apdx. D, p. 36). In pertinent part the cross reference section states:

> If the offense involved in transporting, distributing or receiving, possession or advertising to receive material involving the sexual exploitation of a minor, apply §2G2.2.

USSG §2G3.1, **(emphasis added)**. The Court reasoned that pursuant to guidelines §1B1.3 the 'offense' contemplated under guideline §2G3.1 included the child pornography alleged in Counts 1 and 2 of the indictment. (Apdx. D, p. 36). Pursuant to the plea agreement, however, counts 1 and

2 of the indictment were dismissed. The trial court's incorrect reasoning increased the sentencing guideline base offense level to 15. (Apdx. D, p. 36).

By applying the everyday mechanics of the English language, the 'offense' is the act with which a defendant stands charged. The Eleventh Circuit has defined relevant conduct as all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would otherwise be accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense. United States v. Holland, 22 F.3d 1040 (11th Cir.1994).

Obviously the 'offense' contemplated in the cross reference of guideline §2G3. (c) is different from relevant conduct. Even in the court concluded that the acts alleged in counts 1 and 2 of the indictment
were relevant conduct, they could not be used to apply guideline §2G2.2. Consequently, the trial court began its sentencing guideline calculation at the incorrect base offense level of 15. See, United States v. Maxwell, 34 F.3d 1006 (11th Cir. 1994); United States v. Rodgers,
951 F.2d 1220 (11th Cir. 1992).

II. THE TRIAL COURT ERRED IN APPLYING AN UPWARD ADJUSTMENT FOR OBSTRUCTION OF JUSTICE.

The trial court ruled that guideline §3C1 applied to the case at bar. (Apdx. D, pp 9-10). The stated that there were three reasons that this obstruction of justice section was applicable. Two of these reasons related to Lewis' testimony in the supresseion hearing held prior to his guilty plea and his testimony given during the sentencing hearing. (Apdx. D, p. 36). The third reason for application of §3C1 related to Lewis' offer of the exculpatory letter dated July 11, 1984.

The court ruled that Lewis committed perjury numerous times and provided materially false information to a Judge. The Court further ruled regarding the July 11, 1994 letter that Lewis had produced "a false document, in that it was without question a fabrication written by the defendant shortly before trial." (Apdx. D, pp. 36-44). The further ruled that he "also committed perjury when he testified that the postal inspectors purposely kept the package where he couldn't see it." (Apdx. D, pp. 36-44).

The trial court further ruled that Lewis "provided materially false information to judge in the suppression hearing when he testified that he asked at least five times

for an attorney." (Apdx. D, pp 38-39). Judge Blackburn stated:

> The court did not believe Mr. Lewis' testimony on this point at the time of the suppression hearing. This testimony was obviously material evidence in that this testimony would tend to influence and affect the issue under determination, that being whether the statement given to the postal inspector should be suppressed." (Apdx. D. p. 39).

The question of whether the trial court properly applied the obstruction of justice enhancement is a mixed question of law and fact. United States v. Burton, 933 F.2d 916 (11th Cir. 1991). Further, "although the District Court's findings of fact are reviewed under a clearly erroneous standard, the Court's application of the law to those facts are subject to de novo review." United States v. Huppert, 917 F.2d 507 (11th Cir. 1990). Because the question on this case is whether Lewis' conduct constituted willful obstruction of justice, it turns primarily on the legal interpretation of a sentencing guideline term. Therefore, this issue demands de novo review.

In Burton, the 11th Circuit reasoned that for an

some manifestation of willful obstruction or attempting to obstruct the administration of justice. This would require that a defendant act with the purpose of obstructing justice. See, United States v. Stroud, 893 F.2d 504 (2d. Cir. 1990).

The obstruction provisions of sentencing guideline §3C1.1 states that the enhancement should not be appled against a defendant for the exercise of a Contitutional right. The guideline further states that in applying this provision in respect to alleged false testimony or statements by a defendant, such testimony or statements should be evaluated in a light most favorable to the defendant. USSG §3C1.1, n.1.

The only evidence in existence that Lewis perjured himself or gave any false statement is that his statements do not exactly match the statements of other witnesses. Clearly this is insufficient indicia of false or perjured testimony.

In considering a sentence enhancement for obstruction of justice based on trial testimony the Court should review the evidence and make independent findings necessary to establish a willful impediment to justice. The trial court should address each element of
alleged perjury in a separate and clear finding. USSG §3C1; Fed. R. Crim. P. 32(c)(3)(d).

The controlling definition of perjury can be found in 18 U.S.C. §1621. It states that a witness violates this statute by testifying under oath and giving false testimony concerning a material matter with the willful intent to provide false testimony. Historically, however, inconsistent testimony arising from confusion, mistake or faulty memory is not perjury. United States v. Dunnigan, 113 S.Ct. 1111 (1993). See also, United States v. Debrow, 74 S.Ct. 113 (1953); United States v. Norris, 57 S.Ct. 535 (1937).

Clearly, the perjury statute requires that a witness believe that the testimony that he gives is false. Thus, if the witness believes his testimony to be true the requisite mens rea is not present. Mere denials of guilt or purely exculpatory statements do not satisfy the statute and thereby necessarily justify enhancement. United States v. Salemi, 26 F.3d 1084 (11th Cir. 1994).

The trial court did not have sufficient information about the exculpatory July 11, 1994 letter to determine that is was a fabrication. In fact, if any inference can be drawn from the testimony it is that the letter could very easily be genuine. The postal inspector testified that not all of the computer disks found at Lewis' apartment were seized. (Apdx. D, p. 27). Further, the postal inspector admitted under cross examination that there may have been other correspondence from Lewis not introduced

as evidence. (Apdx. D, p. 26).

Therefore, the information available to the trial court was insufficient to make the determination that the July 11, 1994 letter was without a doubt a fabrication, and therefore erred by enhancing Lewis' for obstruction of justice.

III. THE TRIAL COURT ERRED IN CONSIDERING CERTAIN TESTIMONY AS RELEVANT CONDUCT.

At the sentencing hearing, the trial court heard testimony from four (4) individuals who were former empoyees of the Baskin Robbins ice cream shop operated by Lewis many years ago. Each of the individuals testified to alleged sexual misconduct by Lewis which had occurred as much as 13 years earlier.

Sentencing guideline §1B1.3 defines relevant conduct as all acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction. USSG §1B1. Lewis plead guilty to and was convicted of mailing prohibited matter throught the United States mail. Unsubstantiated sexual misconduct occurring many years prior to conviction cannot be considered the same course of conduct. Obviously, the act of sexual abuse

is in no way similar to the act of mailing prohibited matter through the mail. Further, the alleged instances of sexual abuse were too remote in time to the offense of conviction to be properly considered. These instances of alleged sexual conduct exist in discreet identifiable units of unrelated events apart from the offense of conviction. There exists no similarity, regularity nor temporal proximity between the alleged acts of sexual misconduct and the offense of conviction. See, United States v. Maxwell, 34 F.3d 1006 (11th Cir. 1994).

According to U.S.S.G. §4A1.2 (e)(1), the guidelines establish a 15 year window for counting prior felony conviction for purposes of determining career offender status. This window applies to convictions in which a defendant's guilt has been proven beyond a reasonable doubt. United States v. Cornog, 945 F.2d 1504 (11th Cir.1991). A similar standard standard should also apply in looking backward in time to mer unsubstantiated, non charged allegations of dissimilar characteristics to the offense at hand? Clearly the trial court acted erroneously be considering prior bad acts allegedly committed by Lewis as much as thirteen years earlier.

IV. THE TRIAL COURT ERRED IN DENYING THE PETITIONER A DOWNWARD ADJUSTMENT FOR ACEPTANCE OF RESPONSIBILITY.

The sentencing guidelines clearly state that if a defendant accepts responsibility for his crime that the base level for his offense may be decreased. U.S.S.G. §3E1.1.Evaluating whether a defendant has accepted responsibility requires consideration of both objective factors and subjective considerations. United States v. Cruz, 946 F.2d 122 (11th Cir. 1991). The decision to award the departure is clearly in the trial court's discretion. United States v.Kendrick, 22 F.3d 1066 (11th Cir. 1994).

To receive the reduction in the offense level prusuant to §3E1.1, a defendant must clearly demonstrate a recognition and affirmative acceptance of personal responsibility for his criminal conduct. United States v. Anderson, 23 F.3d 368 (11th Cir. 1994). See also, United States v. Gonzalez, 70 F.3d 1236 (11th Cir. 1995). Under Cruz, the trial court should also consider the defendant's demeanor and his sincerity in deciding whether to apply a reduction for acceptance of responsibility.

A guilty plea standing alone does not necessarily entitle a defendant to a reduction for acceptance of responsibility. United States v. Chukwura, 5 F.3d 1420 (11th Cir. 1993). It is, however, significant evidence in that regard. United States v. Rodriguez, 64 F.3d 638 (11th Cir. 1995). The fact that Lewis did enter a guilty plea should be considered significant in determining whether to award the departure

for acceptance.

Further, the decision to deny a reduction for acceptance of responsibility is discretionary and is given great deference upon appellate review. The trial court's determination will be overturned if it is without foundation and is clearly erroneous. United States v. Mullins, 65 F.3d 1560 (11th Cir. 1995). This is just such a case.

Because Lewis plead guilty to mailing prohibited matter and given his cooperation in this case, he is clearly entitled to a reduction for acceptance of responsibility. To deny Lewis a reduction would be to prevent Lewis from exercise his constitutional right to object to an enhancement. The trial court clearly erred in denying Lewis a reduction for acceptance of responsibility.

V. THE TRIAL COURT ERRED IN GRANTING THE GOVERNMENT'S MOTION FOR AN UPWARD DEPARTURE.

The trial court granted the Government's motion for an upward departure and increased the offense level by eight (8) levels based on U.S.S.G. §2A3.4(b)(1), (2) and (3). (Apdx. D, pp. 44-46).

A Court's determination of whether to depart from the guidelines initials a two step process. First, the sentencing judge must decide whether there are unusual aspects to the case that are not taken into consideration when the sentencing guidelines were formulated. Secondly, the departure must be based on circumstances that are not only atypical but meaningfully atypical. United States v. Alpert, 989 F.2d 454 (11th Cir. 1993).

Although the Sentencing Reform Act instructs appellate courts to review a departure solely for reasonableness, this requirement is two fold. 18 U.S.C. §3742(e)(3), (f)(2). First, the appellate court must insure that the aggravating circumstances relied upon by the District Court were not adequately considered by the guidelines. Next, the reviewing court must determine whether these circumstances were sufficiently unusual to permit the departure in question. Furthermore, the Court must take into account the

context in which the lower court made its determination. This Court must, therefore, decide whether that determination arose from an exercise of discretion, a finding of fact or a conclusion of law. United States v. Alpert, 989 F.2d 454 (11th Cir. 1993). Admittedly, application note number 5 to U.S.S.G. §2G2.2 states that a departure may be warranted if a defendant sexually abused a minor at 'anytime,' whether or not such abuse occurred during the course of the offense of conviction is clearly not shown by the evidence.

Further, the trial court erred in determining that Mr. Fisher, and employee at the Baskin Robbins operated by Lewis, was under Lewis' supervision at the time of the alleged abuse. (Apdx. D, p. 44). Clearly, fisher was at the shop voluntarily and working for pay. Fisher was free to leave the presence of Lewis at any time he chose to do so.

It is clear that U.S.S.G. §2A3.1(b)(3) is applicable to individuals charged with the care, custody and supervisory control of children. The commentary to that section, however, specifically lists teachers, daycare providers and baby-sitters as those that should be found to be in 'supervisory control.' Mr. Lewis does not fit into this category.

U.S.S.G. §2A3.1 has been clearly misapplied in this case, and that error demands reversal.

CONCLUSION

For the reasons specifically set out in the above arguments we respectfully request that this Honorable Court hear this case and reversed the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted and served,

JOHN MARK McDANIEL
223 East Side Square
Huntsville, Alabama 35801
(205) 534-3018

ROBERT B. TUTEN
223 East Side Square
Huntsville, Alabama 35801
(205) 536-6009

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

OPINION

Eleventh Circuit Case No. 96-6270
Filed March 27, 1997

Pages A-1 thru A-10

DO NOT PUBLISH

United States Court of Appeals
for the Eleventh Court

Case Nº. 96-6270
Non-Argument Calendar

D.C. Docket No. CR-95-B-335-NE

United States of America
Plaintiffs-Appellee,

v.

Charles Ray Lewis,
a.k.a. Don Reynolds,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

Filed March 27, 1997

Before: **TJOFLAT, ANDERSON,** and **COX,**
Circuit Judges.

PER CURIAM:

I. INTRODUCTION

Appellant Charles Ray Lewis appeals his 71 month sentence. Lewis was indicted for mailing and receiving prohibited matter. Count One of the indictment charged Lewis with knowingly receiving a videotape depicting sexual acts involving minors in violation of 18 U.S.C. § 2252(a)(2). Count Two charged Lewis with using the mails for delivery of the videotape identified in Count One in violation of 18 U.S.C. § 1462(1). Count Three charged Lewis with using the mails to advertise obscene videotapes in violation of 18 U.S.C. § 1461. Counts Four, Five, and Six charged Lewis with using the mails to deliver various obscene videotapes in violation of 18 U.S.C. § 1461. Count Seven alleged forfeiture of various items used or intended to be used to promote the commission of the offenses charged in Counts Two through Six. On the day his trial was to begin, Lewis pleaded guilty to Counts Three through Seven. The government dismissed Counts One and Two.

On appeal, Lewis argues that the district court (1) erred by using the conduct charged in Counts One and Two to determine his base offense level, (2) improperly enhanced his sentence for obstruction of justice, (3) improperly denied him an acceptance of responsibility reduction, and (4) erred by applying an upward departure in sentencing for the sexual abuse of minors.

II. DISCUSSION

A. Base Offense Level

The district court determined that U.S.S.G. § 2G3.1, which sets the base offense level for importing, mailing, or transporting obscene matter, is the guideline applicable to Lewis' offenses. however, pursuant to the cross-reference in §2G.3.1(c)(1), the district court found that the conduct underlying Counts One and Two called for the application of U.S.S.G. § 2G2.2., which sets the base offense level for receiving material involving the sexual exploitation of a minor.

Section 2G3.1(c)(1) provides that the district court should apply §2G2.2 if "the offense involved transporting, distributing, receiving, possessing, or advertising to receive material involving the sexual exploitation of a minor" U.S.S.G. § 2G3.1(c)(1). The definition of "offense" includes not only the counts on which the defendant is convicted, but also "all relevant conduct under § 1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context." U.S.S.G. § 1B1.1, comment. (n.1(l)). Section 1B1.3 specifically provides that a district court should take into account all relevant conduct when determining the applicability of a Chapter 2 cross-reference, unless the cross-reference provides otherwise. U.S.S.G. § 1B1.3(a).

Lewis argues that the conduct charged in Counts One and Two is not relevant conduct. He also argues that even if it is relevant conduct, the district court should not have considered the acts alleged in Counts One and Two when determining whether to apply § 2G2.2.

Lewis did not raise these objections before the district court. Consequently, we will only entertain this argument under the plain error doctrine to avoid manifest injustice. *United States v. Stevenson*, 69 F.3d 1292, 12294 (11th Cir. 1995).

The conduct alleged in Counts One and Two is relevant conduct because it is part of the "same course of conduct" as the acts alleged in the counts of the indictment to which Lewis pleaded guilty. *See U.S.S.G. 1B1.3*, comment. (n.9(B)). the fact that Counts One and Two were dismissed does not prevent the district court from considering the acts alleged in Counts One and Two as relevant conduct. *See United States v. Alston*, 895 F.2d 1362, 1371-72 (11th Cir. 1990). We thus conclude that the district court did not commit plain error by using § 2G2.2 to determine Lewis' base offense level.

B. Enhancement for Obstruction of Justice

The district court found that Lewis committed perjury and provided materially false information to a judge at the sentencing hearing and the suppression hearing. The district court also found that Lewis falsified an allegedly exculpatory letter. As a result, the district court increased Lewis' offense level under U.S.S.G. § 3C1.1 for obstructing the administration of justice. Lewis argues that this increase was improper.

We review the district court's determination that Lewis committed perjury, provided false information to a judge, and falsified the letter for clear error. *See United States v. Taylor*, 88 F.3d 938, 942 (11th Cir. 1996). The record supports the district court's conclusion that Lewis perjured himself, provided materially false information to a judge, and falsified the letter. We thus conclude that the district court did not commit clear error by finding that these grounds for an obstruction of justice enhancement exist. Furthermore, these grounds are all sufficient bases on which to increase Lewis' offense level for obstruction of justice. *See* U.S.S.G. § 3C1.1, comment. (nn. 3(b), 3(c), 3(f)). Therefore, the district court did not err by applying § 3C1.1.

C. Acceptance of Responsibility

Lewis contends that the district court erred by refusing to grant him a sentence reduction for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a). We review the district court's determination regarding acceptance of responsibility with deference and reverse only if the district court committed clear error. *United States v. Query*, 928 F.2d 383, 386 (11th Cir. 1991). *See also* U.S.S.G. § 3E1.1, comment. (n.5) ("the determination of the sentencing judge is entitled to great deference on review"). In this case, Lewis falsely denied relevant conduct and obstructed justice. As a result, the district court did not clearly err by denying Lewis a sentence reduction for acceptance of responsibility. *See* U.S.S.G. §3E1.1, comment. (nn.1(a) & 4).

D. Upward Departure for Sexual Abuse of Minors

The district court departed upward from the applicable sentencing guideline range because it found that Lewis had sexually abused several minors. *See* U.S.S.G. § 2G2.2, comment. (n.5). Following the commentary's instructions, the district court judge structured this departure by relying on the specific offense characteristics listed in U.S.S.G. § 2A3.4. *See* U.S.S.G. § 2G2.2, comment. (n.5). Lewis argues that the upward departures were improper. We review a district court's departure from the applicable

guideline range for an abuse of discretion. *Koon v. United States*, 116 S. Ct. 2035, 2046-48 (1996).

The district court increased Lewis' offense level by four levels under § 2A3.4(b)(1), finding that Lewis had sexually abused a child under the age of 12 years. This finding was based on letters that Lewis wrote and mailed to his "pen pal," Kim Lozier. these letters recount in detail various acts of child sexual abuse that Lewis committed. Some of the acts of sexual abuse described in the letters involved children under the age of 12 years. Lewis contends these letters are fictional. However, the district court determined that Lewis' claims that the letters were fictional were not credible, and the evidence presented at the sentencing hearing supported this conclusion.[1] As a

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[1]In one of the letters, Lozier instructed Lewis to find an attractive woman, learn her name, address, marital status, and age, and send Lozier the information. In reply, Lewis wrote a letter to Lozier describing and identifying Sherry Taylor, a woman who Lewis saw at a supermarket. Lewis apparently had memorized Taylor's name, address, and telephone number from her check. At Lewis' sentencing hearing, Taylor testified that she had received an obscene letter from an anonymous "Secret Love." Further investigation by the postal inspectors revealed that Kim Lozier was "Secret Love." This testimony thus verified the contents of one of Lewis' letters and provided the district court with the grounds to discredit Lewis' claims that the

result, the district court did not abuse its discretion by applying an upward departure base on the abusive acts described in the letters.

At the sentencing hearing, Fred Fisher, Richard Baldwin, and Gaines Luce testified regarding acts of sexual misconduct that Lewis committed years ago when Fisher, Baldwin, and Luce were minors working for Lewis at Lewis' Baskin Robbins franchise. Based on Fisher's testimony, the district court increased Lewis' offense level by two levels for sexually abusing a minor in Lewis' supervisory control. *See* 2A3.4(b)(2).

Lewis argues that the district court erred by considering all of this testimony because the acts alleged were too remote in time from the acts alleged in the indictment. This argument is without merit. The commentary for § 2G2.4 clearly provides that "[i]f the defendant sexually exploited or abused a minor *at any time*, whether or not such sexual abuse occurred during the course of the offense, and upward departure may be warranted." U.S.S.G. § 2G2.2, comment. (n.5) (emphasis added).

Lewis also contends that the district court erred by concluding that Lewis' masturbation in Lipford's presence

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letters were based only on fantasy.

constituted "sexual abuse." Lewis did not raise this objection before the district court. We therefore review the district court's determination for plain error. *Stevenson*, 68 F.3d at 1294. We conclude that the district court did no plainly err by finding that Lewis' conduct toward Lipford constituted sexual abuse.

Lewis argues that the district court erred by determining that Fisher was under Lewis' supervisory control at the time Lewis abused him. *See* U.S.S.G. § 2A3.4(b)(3). Lewis contends that § 2A3.4(b)(3) is intended to apply to "teachers, day care provider, baby-sitters, or other temporary caretakers," not to employers. *See* U.S.S.G. § 2A3.4, comment. (n.3). Lewis did not raise this objection before the district court, so we will review the district court's decision for plain error. *Stevenson*, 68 F.3d at 1294.

Lewis was Fisher's supervisor at the time of the abuse. Lewis exploited his position and authority in order t perpetrate the abuse. It is true that the commentary for § 2A3.4 lists "teachers, day care providers, baby-sitters, [and] other temporary caretakers" as examples of those who have supervisory control. However, the language of the commentary makes it clear that this list is neither exhaustive not exclusive. *See* § 2A3.4, comment.(n.3)(For example...").

CONCLUSION

For the foregoing reasons, Lewis' sentence is affirmed.

AFFIRMED. [2]

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[2]Appellant's request for oral argument is denied.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JUDGMENT

Eleventh Circuit Case №. 96-6270
Filed March 27, 1997

MANDATE ISSUED MAY 20, 1997

Pages B-1 thru B-2

United States Court of Appeals
for the Eleventh Circuit

Case Nº. 96-6270
Non-Argument Calendar

D.C. Docket No. CR-95-335-NE

United States of America
Plaintiff- Appellee,

v.

Charles Ray Lewis,
a.k.a. Don Reynolds,
Defendant - Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

Before: TJOFLAT, ANDERSON and COX, Circuit Judges;

JUDGMENT

FILED MARCH 27, 1997

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This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the sentence imposed by the said District Court in this cause be and the same is hereby AFFIRMED.

Entered: March 27, 1997
For the Court: Michael J. Cortez, Clerk

/s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 5/20/97

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

JUDGMENT IN A CRIMINAL CASE

Case No. CR 95-B-335-NE
entered March 11, 1996

Pages C-1 thru C-11

United States District Court
Northern District of Alabama

Case Nº. CR 95-B-335-NE

United States of America,
Plaintiff,

v.

Charles Ray Lewis,
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On
or After November 1, 1987)

The defendant, CHARLES RAY LEWIS, was represented by Robert B. Tuten.

On motion of the United States the court has dismissed counts 1 and 2.

The defendant pleaded guilty to counts 3,4,5,6, and 7. Accordingly, the defendant is adjudged guilty of such counts, involving the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18 USC 1461	Mailing prohibited matter	4/4/94	3
18 USC 1461	Mailing prohibited matter	5/9/94	4
18 USC 1461	Mailing prohibited matter	5/19/94	5
18 USC 1461	Mailing prohibited matter	6/3/94	6
18 USC 1467	Forfeiture of Assets		7

As pronounced on March 6, 1996, the defendant is sentences as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay the United States a special assessment of $ 200.00, for counts 3,4,5, & 6, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 day of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by the Judgment are fully paid.

Signed this the 7th day of March, 1996.

/s/ Sharon Lovelace Blackburn
United States District Judge

Defendant's SSN: 413-80-4666
Defendant's Date of Birth: 6/16/50
Defendant's address:
4515 Bonnell Drive, Apt. 17-D; Huntsville, AL 35816

Defendant: CHARLES RAY LEWIS
Case Number: CR 95-B-335-NE

IMPRISONMENT

The defendant is hereby committed to the custody of the United Sates Bureau of Prisons to be imprisoned for a term of 60 months as to count 3, and 11 months as to counts 4,5 and 6 separately. The sentences imposed as to counts 4,5, and 6 are to run concurrently with each other

but consecutively with the sentence imposed as to count 3, for a total sentence of 71 months.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on ____ _____ to ____ at _____,with a certified copy of this Judgment.

_____
United States Marshall

By:_____
Deputy Marshall

Defendant: CHARLES RAY LEWIS
Case Number: CR 95-B-335-NE

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 36 months.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state, or local crime; specifically, the defendant shall not illegally possess a controlled substance and shall not own or possess a firearm of destructive device.

2) The defendant shall not leave the judicial district without the permission of the court or probation officer.

3) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

4) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

5) The defendant shall support his or her dependents and meet other family responsibilities.

6) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

7) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

8) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

9) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered.

10) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer.

11) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

12) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

13) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

14) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record of personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

15) The defendant shall report in person, within 72 hours of release form the custody of the Bureau of

Prisons, to the probation office in the district where the defendant is released.

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall participate, if and as directed by the probation officer, in such mental health/vocational rehabilitation programs as the officer may direct.

2) The defendant shall not have unsupervised contact with minor children under the age of 18. This includes the defendant's own grandchildren.

RESTITUTION AND FORFEITURE

FORFEITURE

The defendant is ordered to forfeit the following property to the United States:

-Magnavox VHS-HQ 4-head VCR, Model VR9035AT01, S/N 83314181
-Maganavox VHS-HQ 4-head VCR, Model BR3440AT03, S/N 22162889
-RCA 13" color television, Model EJR330S, S/N436436193
-Assorted electronic and computer cables
-Two (2) 4-drawer, letter size filing cabinets
-Infotel, Inc. Midwest Micro Elite computer hard drive, Model 386-33MT, S/N 920716016446
-CTX 14" Super VGA color monitor, Model CVP5468N1, S/N A5022001387
-Chicony Electric Company Midwest Micro Eliteheyboard, Model KB-5181, S/N TCK2400676
-Ultra computer mouse, Model KEM260, S/N 0496673
-Woods No. 425 power strip
-Computer instruction manuals

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report except as amended in the post-sentencing report.

Guideline Range Determined by the Court Before Departure:

Total Offense Level:	17
Criminal History Category:	I
Imprisonment Range:	24 months to 30 months
Supervised Release Range:	2 to 3 years
Fine Range:	$5,00 to $50,000
Restitution:	n/a

The fine is waived due to the length of the custodial service.

The sentence departs from the guideline range for the following reason: The Court finds reason to depart upward from the sentence called for by application of the guidelines, inasmuch as the facts as found are the kind contemplated by the Sentencing Commission in Application Note 5 to U.S.S.G. § 2G2.2. Based on information concerning the defendant's relevant conduct and the testimony concerning the defendant's sexual abuse of minors, the Court took into consideration the offense levels provided in § 2A3.4(b)(1), (2),and (3). Having found the specific offense characteristics described in § 2A3.4(b)(1),(2), and (3) present in this case, the Court determined to depart upward 8 levels. This resulted in an offense level of 25, which when combined with criminal history category I, results in an imprisonment range of 57 to 71 months and a fine range of $10,000 to $100,000.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE ELEVENTH CIRCUIT
NORTHERN DISTRICT OF ALABAMA

EXCERPTS OF TRIAL TESTIMONY

Case No. CR-95-335-NE

Pages D-1 thru D-47

Excerpts of Trial Testimony of Mr. Charles Ray Lewis
[pages 5-7]

By Mr. Tuten:

Q. Mr. Lewis, you're the defendant in this case?

A. Yes.

Q. Do you recall the postal inspectors confronting you about the investigation as the basis of the charges against you here today?

A. Yes, sir.

Q. Do you recall when that was?

A. August 26th, '94.

Q. All right. Tell the Court what happened when the postal inspectors confronted you about this?

A. After I received the package, I took it to my office, laid it down, went to the restroom. While I was in the restroom, two postal inspectors came in. One asked if I was through in the restroom, and I said yes. And he pulled out his badge, showed it to me and said he wa interested in the contents of the package that I just received and asked --

Q. Mr. Lewis, did they read you your Miranda warnings and advise you that you had a right to remain silent?

A. Not at that time. I went back to my office, got the package, and he told me to take it into the U.S. Attorney's office. When we got to the U.S. Attorney's

office, one of the postal inspectors read me the Miranda rights, and immediately I said I wanted an attorney present.

And Beryl Hedrick said, "Well, I'm just going to ask you some general questions. And if you don't answer or if you refuse to answer my questions, you're going to have to go to Birmingham for questioning."

He stated asking me questions. And again, I said, "I want an attorney present." he said, "These are just general questions. We're going to have to get the information anyway." And he said that if I didn't answer them, I was going to have to go to Birmingham for questioning.

Q. Mr. Lewis, other than general questions about their investigation, did they ask you specific questions about this case?

A. Specific questions.

Q. Okay. Do you recall what those were?

A. Very vaguely.

Q. Tell us as best you recall.

A. He asked me about the relationship between Don Reynolds and myself, asked me where he lived, asked me if I knew what the contents of the package was. I can't really recall what else.

Q. Did you answer those questions?

A. Yes, sir.

Q. Did you answer those questions voluntarily?

A. Well, I don't know how you could say it was voluntarily. I was intimidated. There was three postal inspectors plus two Huntsville police officers there. I was scared to death. You know, I didn't know what was going to happen. You know, it was a very frightening experience.
Q. Did you believe that the postal inspector's statement that you would have to go to Birmingham for further questioning meant that you wold be arrested?
A. Yes. He implied that the police were there to arrest me if I didn't answer the questions.
Q. Okay.

THE COURT: How did he imply it? Are you saying just the statement that you would have to go to Birmingham made you think you were going to be arrested or what?

THE WITNESS: No. It was just the way that he presented his questioning to me. At least five times I asked for an attorney, and the last or one of the times when I asked for an attorney or I stated that I didn't want to answer anymore questions unless I had an attorney, he said, "Well, I don't think that you'll be arrested if you'll answer my questions." And then he turned to the

* * * *

A. Yes, sir.

Q. That would, of course, include Huntsville; correct?

A. Correct.

Q. Do you recall the events that occurred on August 26th, 1994?

A. Yes, sir.

Q. Were you involved in an interview of the defendant in this case, Mr. Lewis?

A. Yes, sir.

Q. If you could explain for the Court the events leading up to the time when you came in contact with Mr. Lewis for the purpose of that interview?

A. On August 26th, 1994, at 12:17 p.m., I dressed as a postal letter carrier and delivered a package to Mr. Lewis in the hallway of the building where his work place is located. I asked Mr. Lewis -- Mr. Lewis met me in the hallway and asked if I was looking for him. I asked if he was Charles Lewis. He said yes and I asked, and I have in quotation remarks in my narrative of this --

Q. Let me stop you at this point. You made notes of this whole event, did you not?

A. Yes, sir.

MR. PHILLIPS: Your Honor, I have shown defense

counsel and had marked as Government's Exhibit 1 Mr. Hedrick's rough notes of this interview.

THE COURT: All right.

Q. You are using those at this point, sir?

A. I am using the notes as well as the typed narrative which expanded upon the brief notes that I wrote.

Q. All right. Go ahead.

A. In quotes I have prepared, "Is this your package even though it has Don Reynolds' name on it," close quote. Mr. Lewis replied yes. Mr. Lewis signed for the package and walked away. He signed the name Charles Lewis for the package which was addressed to Don Reynolds.

Q. When he walked away, Inspector Hedrick, did he have the package with him?

A. Yes, sir.

Q. Could you tell whether or not he looked at the package?

A. I could not.

Q. But he walked away after receiving it?

A. Yes, sir.

Q. Where did he go after receiving it to your knowledge?

A. Down the hallway.

Q. When was the next point you had any contact with him?

A. At 12:19 p.m. at the U.S. Attorney's office in

Huntsville.

Q. All right. And between the time you gave him this package and the time that -- 12:19 in the U.S. Attorney's office, did you have any conversation with him?

A. Postal inspectors David Dirmeyer and Bob Kuykendall had the assignment of locating Mr. Lewis after the package was delivered. They accompanied him to the U.S. Attorney's office.

Q. And were you waiting for him there?

A. Yes, sir.

Q. And when he came into the office, what did you tell him?

A. I observed Inspector Kuykendall and listened to Inspector Kuykendall read Mr. Lewis his Miranda rights from a card that I carry. Inspector Kuykendall borrowed that Miranda card from me and read the rights to him.

Q. At that point, the reading of the Miranda rights, was that done in your presence?

A. Yes, sir.

Q. Did Mr. Lewis have any questions about those Miranda rights?

A. No, sir.

Q. Did he indicate any hesitancy whatsoever to answer questions?

A. None whatsoever.

Q. Did he ask for an attorney?

A. Ultimately.

Q. But prior of excuse me -- right after being read his Miranda rights, did he ask for a lawyer?

A. No, sir.

Q. Did you tell him he was under arrest?

A. No, sir.

Q. Did anyone else in your presence tell him he was under arrest?

A. No, sir.

Q. And after reading the Miranda rights, did you ask questions of Mr. Lewis?

A. Yes, sir.

Q. What did you ask him?

A. What can you tell us about the package.

Q. What was his response?

A. I don't know what it is. Mr. Lewis then explained that Don Reynolds, the addressee of the package, is a friend of his who occasionally gets mail in his post office box. Lewis said Reynolds doesn't live here. He lives in Ohio, and Reynolds' address can be found in Lewis' apartment.

Lewis denied any knowledge of R.T., Halls, Tennessee, the purported sender of the package which was, of course, the undercover name that the postal inspector in Memphis used during his investigation. He told me that he forwarded material -- then after telling me he didn't know about R.T. in Halls, Tennessee, he told me that he forwarded material to R.T. in Halls, Tennessee, for Don Reynolds.

Q. So at first he told you he didn't know anything at all about R.T.; is that correct?

A. That's correct.

Q. And then he next tells you that he forwards mail to R.T.?

A. Correct. Those were back to back statements.

Q. Did you obtain any type of personal history information from him?

A. Yes, sir.

Q. And generally what did that consist of?

A. Name, date of birth, Social Security number, family members.

Q. Approximately how many interviews have you done in the course of your tenure with the postal inspector service?

A. Five hundred, a thousand.

Q. Is that routine to get personal history information?

A. Yes, sir.

Q. And after getting this information, did he make any statements about anything that he might have at his apartment?

A. He told me that he had a computer at his apartment. He told me that he had over a hundred videotapes at his apartment.

Q. And again, were you making contemporaneous notes of this conversation?

A. Yes, sir.

Q. After Mr. Lewis told you about what was in his apartment, did you make any statement to him in regard to the investigation?

A. I suggested to Inspector Dirmeyer that at that point in the interview that we needed to -- it appeared to me that Mr. Lewis was not going to be open about the questions we were asking him, and I suggested that Inspector Dirmeyer inform him of the type of undercover operation so essentially Mr. Lewis would know that he had been caught in an effort to perhaps get him to be more open with us in the questions and the answers.

THE COURT: Let me ask you this: Why would he just out of the blue tell you that he had a hundred videotapes at the apartment?

THE WITNESS: I'm sure, Your Honor, that I asked him about videotapes. I'm also sure that I asked him about a computer, because those were -- while I didn't incorporate those questions in my notes, they would have been apart of the type of questions I would have asked.

THE COURT: Okay.

Q. (By Mr. Phillips) Inspector Hedrick, was there any point in this interview of the defendant that you discussed the nature or scope of the undercover operation with him?

A. Inspector Dirmeyer explained that with him, and I made remarks following Inspector Dirmeyer's explanation.

Q. And was that done in your presence?

A. Yes, sir.

Q. And generally what was he told?

A. That this was an undercover program of the postal inspection service, that R.T. in halls, Tennessee, was actually a postal inspector, and that he had ordered child pornography from the postal inspection service.

Q. Did he receive a copy of a search warrant from you or from Inspector Dirmeyer?

A. At the conclusion of the interview, he was shown a copy of the search warrant. He declined -- since he declined to participate in the search, he was not given a copy at that time. A copy was left at his apartment.

Q. Did you have any notation to indicate at that time Mr. Lewis said he wanted an attorney?

A. Yes, sir.

Q. What time was that?

A. 12:43 p.m..

Q. And how does that time period relate to when he first came in the U.S. Attorney's office?

A. It was 24 minutes later.

Q. Any time prior to 12:43, did Mr. Lewis ever ask you or tell you that he wanted an attorney?

A. No, sir.

Q. Did you ever threaten to have the Huntsville Police

Department arrest him?

A. No, sir.

Q. Do you recall the exact words Mr. Lewis said after you showed him the copy of the search warrant?

A. Yes, sir. I wrote it in quotation marks in my notes.

Excerpts of Trial Testimony of **Mr. David Dirmeyer**
[pages 120-122]

THE COURT: Let's just go forward with the evidence.

MR. PHILLIPS: If is please the Court, we would call Inspector David Dirmeyer.

DAVID DIRMEYER,
GOVERNMENT'S WITNESS, SWORN.

THE CLERK: Please state your name.

THE WITNESS: My name is David Dirmeyer, D-I-R-M-E-Y-E-R.

THE CLERK: In what city and state do you reside?

THE WITNESS: In Memphis, Tennessee.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. PHILLIPS

Q. Mr. Dirmeyer, you're a United States Postal Inspector in Memphis; is that right?

A. Yes, I am.

Q. Were you involved in some way with the investigation concerning the defendant in this case, Mr. Charles Lewis?

A. Yes, I was.

Q. Just generally for the Court describe your role in this investigation.

A. I placed an undercover advertisement in a newspaper in Memphis called the Memphis Flyer, and Mr. Lewis responded to the ad, and I corresponded with him. I used the undercover mane R.T. or Richard in my correspondence with Mr. Lewis.

MR. PHILLIPS: May I approach the witness, Your Honor?

THE COURT: You may.

Q. Inspector Dirmeyer, I show you what has been marked for identification as Government Exhibit Number 8. I'll ask you if you recognize that?

A. Yes I so.

Q. What is that please?

A. This is a copy of the classified section of the Memphis Flyer.

Q. And does that particular page contain anything you recognize?

A. Yes. It contains the undercover ad that I put in there.

Q. Do you recognize that as being the ad that you, in

fact, directed to be run in that publication?

A. Yes, sir.

Q. Do you know based on other aspects of the investigation where that particular newspaper that you hold in your hand, Government's Number 8, was found?

A Yes. This was recovered from Mr. Lewis' residence pursuant to a search warrant.

MR. PHILLIPS: Your Honor, we would offer Government Number 8.

THE COURT: all right. It's received.

Q. Inspector Dirmeyer, could you read the as, please?

A. It's in the wanted to buy section, "I want unusual, hard to get bizarre videos, European, Scandinavian preferred. I have a growing collection and am willing to buy or trade. Write R.T., P.O. Box 102, Halls, Tennessee, 38040."

Q. Inspector Dirmeyer, approximately how many obscenity or child pornography investigations have you either been the agent on or participated in?

A. Over 50.

Q. How long have you been a postal inspector?

A. I've been a postal inspector for six years, and I've had this assignment for approximately three years.

Q. Inspector Dirmeyer, I'll now show you what's been

marked for identification as Government Exhibit Number 16. I'll ask you to examine that, please?

A. Yes, sir.

MR. PHILLIPS: Your Honor, it's a little bit out of order. I just looked around, but if there's anyone that's a witness in this case, I would invoke the rule.

* * * *

[pages 141-147]

. . . . defendant had traded with you, Government Exhibit 1 and 2?

A. It was sent in response to the tapes and to his letter saying that he was interested in seeing a video of a father and young sons.

Q. You told him in this letter, Government 3, that this material that he was requesting was illegal?

A. That's correct.

Q. You described it as child pornography?

A. That's correct.

Q. Inspector Dirmeyer, at any time in the course of your investigation, did the defendant ever send you anything indicating he was not interested in that material?

A. No, he did not.

Q. Inspector Dirmeyer, I'll now show you what has been marked as Government Exhibit Number 4, and I'll ask you if you recognize that, please sir?

A. Yes, I do.

Q. And what is that?

A. It's a letter that I received on May 26th, 1994, from Don Reynolds in Huntsville, Alabama, as received -- addressed to R.T. in Halls, Tennessee?

Q. And how did you recognize that?

A. It's got my initials and the date on the bottom.

THE COURT: The date again, May?

THE WITNESS: 26th.

Q. Inspector Dirmeyer, that exhibit has both a letter and an envelope, does it not?

A. Yes, it does.

MR. PHILLIPS: We should move that exhibit.

THE COURT: All right. It's received.

Q. Would you please read the letter?

A. "Dear R.T., thank you for your letter. I really appreciate you writing. I am glad that you enjoyed the videos. I tried to give you a cross selection of different types of scenes"

"Yes, I would like to see the video you described very, very much. Please be assured that anything we exchange will be in the strictest of confidence. I so not exchange material with anyone else and do not show

material to anyone else. I don't know of anyone who appreciates a different variety of material."

"Our laws are made in the interest of politicians who are out to gain votes and support, not human rights. I think that God instilled in humans the sense to make decision for herself, himself. I further think that God instilled this ability in a girl or boy when they reach the age of puberty. I know that I knew and had the ability to make decisions for myself concerning sex by the time I was ten years old."

"I deeply appreciate the opportunity to trade videos with you. Again, please be assured anything that you want to send will be appreciated, and I will regard it in total and complete confidence. I will try to tape some more for you this weekend. I've been working out of town for the last few weeks, and my time is limited. Thanks again. Your friend, Don."

Q. And that's the letter you received from the defendant; correct?

A. That's correct.

Q. I want to go back just a moment, Inspector Dirmeyer. In the second paragraph, the defendant writes, "Yes, I would like to see the video you described very, very much." What video is he referring to, sir?

A. He is referring to the father and young son video that described to contain a 12 to 13 year old boy, the videotape I told him was illegal child pornography.

Q. In the next sentence, does he say, "Please be assured that anything we exchange will be held in the strictest of confidence"?

A. That's correct.

Q. Does he also use the word "exchange" in the next sentence?

A. Yes, sir. It says, "I so not exchange material with anyone else and do not show material to anyone else."

Q. The next to the last paragraph in the same letter, does the defendant begin the paragraph by saying, "I deeply appreciate the opportunity to trade videos with you"?

A. Yes, he does.

Q. And he offers again or tells you that anything you want to send to him will be regarded in total and complete confidence; correct?

A. That's correct.

Q. At the end of the letter, Inspector Dirmeyer, is he discussing taping some more tapes for you?

A. Yes, sir. He says, "I will try to tape some more tapes for you this weekend."

Q. And he tells you he's been working out of town for the last few weeks; correct?

A. Yes, sir.

MR. PHILLIPS: May I have just a moment, Your Honor?

THE COURT: Yes.

Q. Inspector Dirmeyer, let me show you Government Exhibit Number 5. I'll ask you if you recognize that, please, sir?

A. It's a letter that I received on July 14th, 1994, from Mr. Lewis.

Q. Does it also contain an envelope as part of the exhibit?

A. Yes. It's postmarked in Huntsville, Alabama. It's addressed to R.T. in Halls, Tennessee, and it has a return address of Don Reynolds in Huntsville, Alabama.

Q. What is the date of that letter, please?

A. The date of the letter, I received it on July 14th, 1994. His date is july 10th, 1994.

Q. So that's the date the defendant put on the letter?

A. That's correct.

Q. What is the postmark on the letter?

A. July 11th, 1994.

MR. PHILLIPS: Your Honor, we would move Government 5.

THE COURT: Received.

Q. Inspector Dirmeyer, could you read the letter, please?

A. "Dear R.T., thank you for the picture. It is very good. I understand about you having to be away. I have been working out of town and have not been home n about three weeks. I have been running like crazy this weekend trying to get caught up."

"I will make some more copies of videos for you as soon as I possibly can. I can't hardly wait to get the video of the father and son. I would be interested in the photos that your friend makes. Looking forward to hearing from you soon. Your friend, Don."

Q. Inspector Dirmeyer, the defendant mentions in the first sentence of this July 10th letter, thank you for the picture. What picture is he referring to?

A. I mailed him a large poster size picture so that I could -- to facilitate surveillance of him and see where he lived and see where he took this picture to assist us in establishing probable cause to get the search warrant for his apartment after we did the controlled delivery. We had this giant picture so it's easy to see him when he carried it from his car to see which apartment he carried it into.

Q. Were you in any position to observe him when he picked up this poster from the post office?

A. Yes, I was. I was in the post office.

Q. Did you participate in the surveillance of him after

he left the post office with this?

A. Yes, I did.

Q. Did you participate in the surveillance of him after he left the post office with this?

A. Yes, I did.

Q. And the purpose of it was simply to have something big enough so you could follow it; would that be correct?

A. That's correct.

THE COURT: What was the picture?

THE WITNESS: It was of a nude young man.

Q. Was it a full body shot? Would that be accurate?

A. Yes. It was a full body shot of a nude man.

Q. In the last sentence of this letter, the defendant says, "I can hardly wait to get the video of the father and son." And he said, "I will be interested in the photos your friends make." How did you interpret that please?

A. He's looking forward to the child pornography videotape. And I would be interested in the photos that your friend makes, I believe I told him that the poster, I had a friend who could enlarge photos, and that poster was an example, and if he had any photos that he wanted enlarged, I could have it done for him.

Q. This was part of the same series of correspondence you've testified about previously?

A. Yes, sir. At this point, we were delaying the delivery of the child pornography to allow us to conduct

our investigation and establish probable cause for his residence.

Q. When you say to establish probable cause to the residence, was that partly to make sure he lived where you thought he lived?

* * * *

A. Yes. sir.

Q. So this would have been approximately one month later when you received this letter?

A. Yes, sir.

Q. And is there an envelope with it?

A. Yes, there is.

MR. PHILLIPS: Your Honor, we would move Government 7.

THE COURT: Received.

Q. If you could read that letter, please.

A. "Dear Robert, it certainly was good to hear from you again. I'm glad that you're back from California. I hope that you had some time to enjoy yourself while out there."

"I don't know why your letter was returned. I have had other mail that was sent back to the sender. I talked with the lady to the post office about it. She said they were having trouble with the automate sorter. If a piece of mail doesn'tscan for some reason, it is supposed to be routed for hand sorting. She said, however, sometimes instead of going to the hand sorting bin, it is rerouted back to the sender. I'm glad that you will talk to him again about it. He is very secretive about it. I have only been able to pry very litle information from him. I would give my right

ball to watch him suck one of his sons or see a video of it. Every time I see him with one of his sons, I get hornier than hell thinking about him doing him."

"I cannot wait to get the video. I do to the mailbox everyday hoping it's in the mail. Did you enjoy the videos I have sent so far? I don't know exactly what you are into. I love anything that has to do with sex, especially unusual happenings."

"I am really looking forward to trading some more videos. I wish that you knew of another one or two guys that could be trusted to trade with. I'm looking forward to hearing from you and seeing the tape. Your friend, Don."

Q. Inspector Dirmeyer, let's go back to the letter just a moment. the third paragraph of that letter, is that where the defendant tells you he would give his right testicle to watch this sex act involving a father and young son?

A. That's correct. It says, "I would give my right ball to watch him suck one of his sons, I gets hornier than hell thinking about him doing him."

Q. In the very next sentence, what does the defendant tell you?

A. "I cannot wait to get the video. I go to the mailbox everyday hoping it's in the mail."

Q. And following that, in the next paragraph, what does he say?

A. "Did you enjoy the videos I have sent so far."

Q. And what video is he referring to, Inspector

Dirmeyer?

A. He's referring to "My Boy's Yellow Hanky, "Everybody Needs a Brother Like You," and the other videos that he sent.

Q. And, Inspector Dirmeyer, does he say he's looking forward to trading some more with you?

A. He says, "I'm really looking forward to trading some more videos. I wish that we knew of another one or two guys that could be trusted to trade with. I'm looking forward to hearing form you soon -- hearing from you and receiving the tape."

Q. Inspector Dirmeyer, did you ever receive in the course of this investigation any letter from the defendant dated July 11th, the letter dated July 11th wherein he said he didn't want to trade with you anymore?

A. No, sir, I did not.

THE COURT: Well, the letter that you all...

* * * *

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BY MR. TUTEN:

Q. Inspector Dirmeyer, how many other videos did you receive from someone calling himself Don that's not an exhibit in this case so far?

A. None. I mean that he didn't plead to Monday?

Q. Did you get any other -- did you get any other videos that have not been introduced as an exhibit up to this point?

A. In this hearing today?

Q. Yes, sir.

A. Yes, sir.

Q. Okay. Did you also receive other letters along with those?

A. We may have had some letters that Mr. Phillips didn't introduce. I can't remember all of the letters that I received from him.

Q. Well, are there other letters that either you sent or that somebody named Don sent in connection with this investigation?

A. There very well might be, sir.

Q. Do you know when those letters may have been sent?

A. No, sir.

Q. Did you know how many other letters you may...

* * * *

Q. You did not complete and thorough search of that apartment, did you not?

A. Yes, sir.

Q. You seized certain computer equipment?

A. Yes, sir.

Q. How many disks did you not seize that you left in the apartment?

A. I do not know.

Q. Did you leave any?

A. I believe we did, yes, sir.

Q. I don't want to put words in your mouth, but was it a substantial number of disks that were not seized?

A. I don't recall. Inspector Hedrick was the case agent, and he was the supervisor of the search. He made the determination of what was taken and what was seized and what was not seized. So you might direct those questions to him.

Q. Okay. Now, in your search of Mr. Lewis' apartment, you did not find nor seize any child pornography tapes?

A. That's correct.

Q. You also found various magazines during that search?

* * *

A. Yes, sir.

Q. All right. what is the content of that letter, and if you could, if there's a particular sentence that deals with sexual activity with children --

THE COURT: Let me stop you one second. There is a person that has come into the room. I just want to make sure you're not a witness, sir. Do you plan to be a witness in the trial?

A SPECTATOR: No.

THE COURT: All right. You're welcome to stay. The witnesses are being excluded. Go ahead.

A. In general terms, the tone of these letters is a slave/master-type relationship where you have a dominant and submissive pair involved in a sexual relationship.

Q. Inspector Hedrick, before you read, based on your review of the material the was mailed by the defendant in the undercover operation, is that theme consistent or inconsistent with what you see in these letters?

A. Well, yes.

THE COURT: I didn't hear the question.

Q. All right. Let me ask you his way, Inspector Hedrick: the theme of the tapes that the defendant mailed in the undercover operation, did they deal with a slave/master-type relationship?

* * * *

Excerpts of Trial Testimony of Mr. Charles Lewis
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. . . letter of July 11th, 1994. Do you recall that?

A. Yes.

Q. Let me show you what I've marked as Plaintiff's Exhibit -- or Defendant's Exhibit Number 2. Do you recognize that letter?

A. Yes, sir.

Q. What can you tell us about that letter?

Q. This letter was written after receiving a poster that was testified to earlier. When I received that poster, I took it home. I just opened the end of the package, pulled the poster out and looked at it very briefly and stuck it back in its wrapper and put it in my closet.

The next day I got to thinking about that big. I mean, why would anybody even want it. You certainly couldn't display it on your wall, and there's no place to store it. And then the thought came to mind, well, maybe the guy in the picture is under age.

So I came back when I got home the next afternoon, I pulled the picture back out to see if maybe it was child pornography. The picture was of a, I guess, Hispanic or Spanish-type gut. He looked, you know, of age, but I thought, well, maybe he's right on the borderline.

So I wrote R.T. another letter stating that I didn't want to trade anymore videos with him, and that I wasn't interested in child pornography. I put the poster in the

trunk of my car, was going to find a place to dispose of it. I carried it in the trunk of my car for several days, and I kept forgetting that it was back there.

It was ironic that the afternoon before the search that I took the poster back out of my car and put it back in the closet, so that I could see it and remember to get rid of it.

One of the things that the inspectors got from my apartment was a things to do list, and on that list I had -- I listed take picture out of car. So, you know, that substantiates that the poster was in my car.

Q. Mr. Lewis, do you recall some testimony earlier about a letter that you had written to R.T. dated May the 21st?

A. Yes, sir.

Q. Do you recall that?

A. Yes, sir.

Q. Let me show you a copy of that letter. Did you write that letter?

A. Yes.

Q. In that letter, it would appear that you're...

* * * *

MR. PHILLIPS: Your Honor, I object to what he was aware of that his attorney found in Birmingham.

THE COURT: Overruled.

Q. Did we discuss the fact that I did not find the July the 11th letter in the evidence that the government said they had against you?

A. Yes.

Q. Did I encourage you or discourage you from using that letter as evidence in the trial of this case?

A. You discouraged me.

Q. Do you recall the postal inspectors going to your hose and conducting a search warrant?

A. Yes, sir.

Q. You did not accompany them on that search warrant?

A. No, sir.

Q. All right. When did you first realize that you had the July 11th letter?

A. After I was arrested.

Q. All right.

A. I mean, I knew I had the disk all along.

Q. Let me show you an envelope that I've marked as Defendant's Exhibit Number 3. Do you recognize this, Mr. Lewis?

A. Yes.

Q. Tell us what that is.

A. It's the original disk of the letters that I wrote R.T.

Q. Is it in an envelope?

A. Yes.

Q. Is there some writing in red ink on the envelope?

A. Yes.

Q. Who put that there?

A. I did.

Q. All right. Is there also some other writing on there?

A. Yes, sir.

Q. And you don't know who put that there, do you?

A. No, sir.

Q. Would you open the envelope and tell us what's inside?

A. It's the original computer disk.

Q. All right. The original computer disk of what?

A. That contains the letters that I wrote R.T.

Q. All right. do they contain all the letter?

A. Yes, sir.

MR. TUTEN: All right. Your Honor, we would move to introduce Defendant's Exhibit Number 2 and Number...

* * * *

...going to -- based on your objections, and it's the probation office's position, I'm going to change Paragraph 37 where it refers to sleep aphasia and make it sleep apnea, but the rest of the defendant's suggestions or the disputed facts are overruled, and the presentence report will not be changes.

Let me hear from the government as to whether it has any objections to the presentence.

MR. PHILLIPS: We have no objection to the report prepared by Mr. Moon.

THE COURT: Well, having gone through it and maybe I will go through it with you all now my thoughts about it, and you all can tell me. I think it would be helpful to go through it with the guidelines in front of you.

All right. First of all, because the defendant -- and referring here to Paragraph 21, and I'm going to ask, there's so many corrections that are going to be made, I'm going to ask the probation office to submit a new presentence reflecting these changes.

Because the defendant pled guilty to counts three through six, that is the mailing of prohibited matter count,

the obscene material, the appropriate guideline to state with is 2G3.1. And for you reference, and I think you all should to through this with me to see how I'm going through this, it's on Page 141 of the U.S. Sentencing Guidelines. That, of course, provides for a base offense level of ten.

However, the Court finds that the defendant did intend to receive material involving the sexual exploitation and abuse of a minor, and the conduct charged in counts one and two should be considered relevant conduct.

If you look at the cross-section or cross-reference under 2G3.1, it reads, "If the offense involved transporting, distributing or receiving, possessing or advertising to receive material involving the sexual exploitation of a minor, apply 2G2.2." And I would also state for the record that offenses defined in the guidelines as the offense of conviction and all relevant conduct under 1B1.3.

So we start out in, I guess, Paragraph 15, 21 would started out initially with 2G3.1, but then we move to 2G3.2. Excuse me. I think I mis-spoke. 2G2.2 All right. Which provides for a bases offenses level of 15.

We next go to the next paragraph of the presentence which says that pursuant to 2G2.2(b) (1), two levels are added because the material involved a prepubescent minor

under the age of 12. Under the law of the Eleventh Circuit, that guideline and the facts of this...

* * * *

[pages 321-328]

...that to be applied in addition to any other increase under the guidelines.

THE COURT: I think that's wrong legally. I've thought a lot about it. I think under the section trafficking material involving sexual exploitation of a minor.

All right. We next go to adjustment for obstruction of justice, which the probation officer did not apply. The Court finds that Section 3C1 of the guidelines applies to this case warranting an increase in the offense level by two levels changing Paragraph 26 from a zero to two.

There are three reasons that the obstruction guideline section is applicable. Two of the reasons relate to Mr. Lewis' testimony in the suppression hearing held on March 4th, 1996, prior to the defendant's plea of guilty and the defendant's testimony given during the sentencing hearing today.

Application Note 3B to the commentary to Section 3C1.1 provides that committing perjury is an example of the type of conduct to which this enhancement applies. Application Note 3F to the commentary to Section 3C1.1 provides that providing materially false information to a judge is an example of the type of conduct to which this enhancement applies.

Material evidence is defined in Paragraph 5 of the application note as, quote, "Evidence, facts, statement or information that if believed would tend to influence or affect the issues under determination," end quotes.

Mr. Lewis testified falsely in the suppression hearing with regard to at least two matters. First, the Court finds that he testified falsely and knowingly committed perjury when he testified that he did not look at the package and did not know to whom it was addressed until he went to his office.

He committed perjury in the suppression hearing when he testified that Investigator Hedrick purposely kept the package where he couldn't see it, and I put that in quotes, because I believe that was his exact testimony.

He also provided materially false information to a judge in the suppression hearing when he testified that he

asked at least five times for an attorney. The Court did not believe Mr. Lewis' testimony on this point at the time of the suppression hearing. This testimony was obviously material evidence in that this testimony would tend to influence and affect the issue under determination, that being whether the statements given to the postal inspectors should be suppressed.

Mr. Lewis also committed perjury today during the sentencing hearing and provided materially false information to the Court. He lied numerous times during his testimony today. It would take too long to go through the times he committed perjury, but I will list a few.

Mr. Lewis committed perjury when he in my opinion -- and this is based on the testimony of the men whose testimony I believed. He committed perjury when he stated he did not have pornographic movies or watch pornographic movies at his place of employment, Baskin Robbins -- not employment, he owned the business -- in Corinth, Mississippi. He lied when he testified that he only watched pornographic movies when he was there by himself.

He committed perjury when he testified that the incident to which Ryan Lipford -- is that his last Name?

MR. PHILLIPS: Yes, ma'am.

THE COURT: -- testified did not occur, that there was never a time when Ryan was at his house, that he was not alone. He knowingly committed perjury in that testimony.

He committed perjury when he testified that he wrote the July 11th letter immediately after receiving the poster, because he thought the poster depicted an under age or possibly depicted an under age male and that whole series of testimony, which I'll get into a little bit later.

He committed perjury when he testified that he had written the letter to R.T., that being the letter of July 11th, stating he did not want to trade anymore videos and did not want to receive any child pornography.

He committed perjury when he testified that he did not ever recall R.T. offering him child pornography. And I don't remember the numbers of the specific exhibits, but the letter in which R.T., who was, of course, the postal inspector, informed him that he would be sending him child pornography The court finds that Mr. Lewis received that letter, responded to that letter affirmatively that he wanted to receive it, and that his testimony that he did not receive

any such letter from R.T. was a knowing -- he knowingly committed perjury in front of this court today.

He committed perjury when he testified that he did not intend to receive a child pornography tape. he committed perjury -- again, the whole testimony about the scenario of his receipt of the package from Investigator Hedrick, he thought it was a letter form his sister, that he did not know what was in the letter. I could go on and on and on. To decide on his testimony and so that I could go back and reference this, I wrote lie, lie, lie, lie, lie, and I have not mentioned nearly all of the times when I wrote the word "lie" beside the testimony of Mr. Lewis.

His testimony where he denied that he intended to receive child pornography was false and was clearly material evidence within the definition given material evidence in the guidelines.

I would also note that Mr. Lewis' willingness to repeatedly engage in perjury in front of this judge even after pleading guilty, coupled with the testimony of the four young men, whose testimony the Court believed, and coupled with the horrific evidence concerning the letter to Sherry Taylor lead the Court to conclude that the terrible descriptions of child abuse contained in the letters Mr. Lewis wrote to Kim Lozier were not totally fiction as he

stated under oath, and the Court finds that testimony to be untruthful.

The defendant is also due the enhancement under 3C1.1 for producing a false document during a judicial proceeding. As I mentioned earlier, based on the evidence, the July 11th letter offered by the defendant was without question a fabrication by the defendant.

The Court will not go through the sequence of the correspondence between the defendant and the undercover postal inspector R.T. which reflect the defendant wanted R.T. to send him a pornographic video involving a minor. The Court is convinced that the defendant wrote the July 11th letter shortly before the trial in an attempt to obstruct justice in the trial of this case.

Although he pled guilty to certain counts of the indictment, he offered the letter today in the sentencing hearing and the disk, which he stated contained the letter, as evidence that he did not intend to receive the video charged in count one and two of the indictment. The letter was false. It was offered in a judicial proceeding in an attempt to obstruct and impede the administration of justice. Therefore, the enhancement provided in Section 3C1.1 is due to apply for this reason as well.

And frankly, if it were within my power -- and one of the things that I did with the probation office at the break was to see, based on the extensive nature of the obstruction that the defendant attempted in this case, to see if there was some additional guideline section or case law that would allow me to increase the guideline range greater than the two points. Two points is certainly an inadequate adjustment here for the obstruction of this defendant.

The next point that we get to here is we come to an adjusted offense level of 17. We next come to the adjustment for acceptance of responsibility. The Court finds that the defendant is not entitled to a three level reduction of acceptance of responsibility. And, in fact, based on his testimony today, and I'm going to go through this a little bit more, in the case *United States v. Munio*, 909 F.2d 436 (11th Cir. 1990), he is entitled to zero reduction for acceptance of responsibility.

Section 3E1.1 of the guidelines provides that if a defendant clearly demonstrates acceptance of responsibility for his offense, the offense can be reduced by two levels. If the defendant qualifies for a decrease under Subsection A. the offense level as determined prior to the operation of Subsection A is level 16 or greater, which in this case it is, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by

taking one or more of the following steps: One, being timely in providing complete information to the government concerning his own involvement in the offense; or two, timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparation for trail and permitting the Court allocate its resources efficiently.

There's no question he would not have been entitled to the three points, but now because of his testimony today, he is not entitled to the two point level reduction for acceptance of responsibility. He wouldn't be entitled to the three points, because there's no question he did not timely provide complete information to the government concerning his involvement, nor did he timely notify the authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trail. He pled guilty on the morning of trial. The government obviously had to issue all the subpoenas and prepare totally for the trial. So he would not be entitled to the three points.

But as Application Note 1A to the commentary states, "A defendant who falsely denies relevant conduct that the Court determines to be true has acted in a manner inconsistent with acceptance of responsibility." As I've just outlined, Mr. Lewis has denied falsely the relevant conduct in this case, and he is not entitled to any reductio for

acceptance of responsibility. We then come to a total offense level of 17.

Now, I'm going to hear from you all. I believe that there are grounds for an upward departure in this case. Maybe before I hear from you all or before I state the grounds for the upward departure that I think are applicable, I will hear from you, Mr. Tuten and Mr. Lewis, and I ask you all to come to the podium. First...

* * * *

[pages 349-350]

...the victim has not attained the age of 12 years, increase by four levels." The Court finds that the letters written to Mr. Lozier, contrary to the defendant's statements, were not fictional. I certainly would hope that at least some of them were, but I find based on all the evidence in this case there were at least some accts of sexual abuse against children under the age of 12 years, warranting and increase in the guideline level by four levels.

I further find that B(2) is applicable if the base offense -- meaning that if the victim had attained the age of 12 years but had not attained the age of 16 years, increase by two levels. The testimony of Mr. Lewis' nephew, Ryan Lipford, in the Court's opinion constitutes sexual abuse.

The activity that the defendant engaged in with Mr. Lipford was shocking to the Court. And Mr. Lipford, I think, testified he was 14 years old at the time. So I will increase the offense level by another two levels.

The Court also finds that if the victim was in the custody, care or supervisory control of the defendant, increase by two levels. The testimony by Mr. Fisher was that he was told by the defendant that he needed to touch his anatomy in order to see whether he was qualified for the job. Mr. Fisher was, in the Court's opinion, under the supervision of the defendant at the time, so I'll increase the guideline level by another two levels.

I want to also say that -- what was the threatening communication?

MS. McGOUGH: Page 51 and 52.

THE COURT: Even if the Court had not found, as it does find, that the descriptions in the letters with regard to the activity involving the prepubescent minors had occurred, the Court would have also increased the guidelines by four levels taking into consideration the specific offense characteristic found in Section 2A6.1(b)(2), which is the guideline section for threatening communications, and it says that if the offense involved a

single instance evidencing little or no -- excuse me. We misread that.

MS. McGOUGH: We did.

THE COURT: I will not be relying on that one obviously. So as I've stated, I am increasing the offense level by eight levels based on the rationale I've given under 2A3.4(b)(1), (2) and (3). I find all three of those specific offense characteristics are applicable to his case resulting in an offense level of 25, with a resulting guideline range of 57 to 71 months and a fine range of $10,000 to $100,000.

I'm going to ask, Mr. Lewis, for you and Mr. Tuten to come the podium. Mr. Lewis, before I hand ...

* * * *